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BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN RE: DB on her own behalf, And on behalf of her daughter, JB	)	
Petitioner,	)	
vs.	)	No. 02-29
Elizabethton City School System,	)	
Respondent.	)	

FINAL ORDER

Howard W. Wilson
Administrative Law Judge
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Murfreesboro, Tennessee 37130

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FINAL ORDER
CASE NO.: 02-29

A Due Process Hearing was requested by the parent, Ms. DB on behalf of her minor daughter, JB. On May 3, 2002 the Division of Special Education, Tennessee Department of Education appointed this Administrative Law Judge to hear the case. A Pre Conference Order was issued on May 7, 2002. The case was heard in Elizabethton, Tennessee on May 30-31, 2002 and via telephone conference call on June 6, 2002. The 45-day timeline was waived by agreement of parties.

I.Findings of Fact

The Court was impressed by the Mother of JB. Her strength, courage and love have no doubt saved JB from a very bleak future. The Court was also very impressed by the school system personnel and the way they have worked with the parent to ensure a better future for JB. By all accounts JB is a delightful child and has managed to charm all of the staff and professionals that work with her. (See, e.g., TR. 138, 172, 412) She is capable of learning. (TR 150, 291, 466). JB is ten years old and is afflicted with severe hearing impairment, visual impairment, mild cerebral palsy, traumatic brain injury and mental retardation. (TR 28, 157) Previous to coming to live with the adopted parent, JB had a very difficult early childhood: was raised in a very abusive environment; locked in a closet for a major part of her first four years of life and was possibly sexually abused. (TR 29). While there is some dispute among JB's doctors regarding her diagnosis, all agree that she has a neurological disorder, which significantly impacts her education. Most professionals agree she is a child with traumatic brain injury, pervasive developmental disorder or

autism. The adoptive parent has spared no effort in attempting to provide the best education possible for her daughter. (TR 32)

The student is taking Prozac and Presparadol. This second drug was just introduced into the medicine regimen during the last three months. The mother describes this new medicine as "miraculous". (TR 60)

At the September 2001 IEP Team meeting. the school district determined that ESY would be determined in March 2002. (PX 5, p. 5) However the school district in March 2002 determined more time was needed before an accurate review could be made. (TR 81) The IEP Team did make a determination and offer the parent a program for ESY in April.

The school district has proposed in the current IEP, 9 hours per week of instruction during the time summer school is in session and then 3 hours per week when summer school is not in session.

The parent stated she thinks an appropriate education during the summer 2002 would include behavior modification, and also include communication skills, social skills and peer interaction. Further, the PEC system should be used. (TR 134)

The program at the child' school is a model program and TRIAD of Vanderbilt University has made a tape for the purpose of using JB's program as a part of its training program. (Pennington, p 33)

Mrs. Whaley testified that JB is a totally different child than when she first encountered JB. (TR 320). Originally, Mrs. Whaley said JB tantrummed and screamed for hours on end and teachers spent a large portion of the day trying to calm her,

sometimes to the point that she had to be wrapped in a sheet or blanket and rocked. (TR 318). Now, she is making progress and improving dramatically. (TR 330)

Generalization is a concept that is a difficult step for children like JB. Generalization is being able to translate things learned in school to other environments. (Tr. 150, 201)

Communication has been a very difficult area for JB. The parent and Dr. Allen both stated that JB is putting two or three words together and that her understanding of concepts has developed and continues to do so. (TR 202, 474) In a limited way, she can tell what she wants, not all of the time, but she is capable of communicating basic wants and needs. (TR 202, 445, 473) Dr. Angelopoulous, one of the experts that testified, thought that her communication was quite remarkable; he saw her do amazing things. (TR 460)

JB is toilet trained, her self-help skills are good, she can interact with people and she does not scream for hours at a time now. (TR 320) The special education supervisor has seen her match pictures with numbers, pick out a card and go to the teacher and sign what she wants to do and sign when she has toilet needs. (TR 321)

For the 2001-2002 school year, JB has had one-on-one instruction and she has made tremendous progress compared to the year she was in the 2nd grade classroom. Mrs. Whaley thought possibly this was JB's best year. (TR 323). Comparing last year's performance and this year's performance on the Vineland Adaptive Behavior Scales, in the communication domain, JB has made almost a year's progress. (Ex. R31 and EX. R 50. TR 324) On daily living skills she stayed about the same, and on motor scores she showed approximately two years progress. (TR 325-6)

Several other witnesses testified that JB has made progress this year, including Dr. Ellis report showing a growth in number of signs she uses and recognizes. (Ex R 55 EX R 84); Ms Townsend stated JB uses the numbers 1 through 10 consistently (TR. 404).

Dr. John Angelopoulous' testimony was extremely enlightening. He had spent several sessions with JB. unlike other experts who testified. Further. he took the time to review an extensive amount of records pertaining to JB and her history at various schools. (TR 456) His opinion was that JB had made progress for school year 2001-2002 and that the IEP and programs met the needs of JB. Further, he testified that the summer program proposed by the school system would meet the needs of JB to offset any regression that may take place. (TR 455).

Extended School Day Program is a day-care program set up to help parents who work. Parents pay a daily fee and this keeps the program open. (TR 479) The program is licensed through the Tennessee Dept of Education as a day care program. (TR 479) The ESP program is not part of JB's IEP. (PX 5). At a meeting in February 2002, it was asked by JB's representatives that ESP be added to JB's IEP. The school district declined to agree to adding day care to JB's educational program. (TR 345-6)

Student was suspended from Extended School Program due to her aggression and sexually inappropriate behavior. which put other children at risk. (PX 62, TR 481). The District further stated that the misbehavior increased in the afternoon due to fatigue and frustration. (TR 44) The District made many efforts to assist JB in her behavior, even to the point of overlooking many of the misbehaviors before the District was forced to suspend JB. (TR 482) "The reason that she was dismissed was that she was a danger to the other students." (TR 364)

Mrs. Whaley, the special education supervisor, testified that "with JB, we did not follow the exact process as soon as we could have, because we wanted to try and keep her there, we didn't want to dismiss her. We wanted to try everything we could, but it got to the point that she was really hurting other children. When she comes with a hand full of hair pulled out [of someone's head] and is hitting and if she jumps on a child and acts sexually inappropriately, that is a danger to other students in the program. That was our reason for finally doing what we did." (TR 365-6)

The sexual acting out caused many problems for the ESP personnel. JB did some sexually inappropriate things that were disturbing to the younger children in the program. This was of a high concern by parents who had children in the ESP. (TR 339)

The School District started PECS, PCM and a extensive Behavior Plan during the 2001-2002 school year. All of these separate areas needed to have time to be refined so as to meet the needs of the student. (TR 370)

The student's classroom special education teacher stated, that the outbursts of JB has gotten less as the year has progressed. Even though on occasions, JB would have more than the day before. (TR 401) Further her special education teacher testified that three hours, three times a week in June and one hour three times a week in July would be sufficient ESY to keep JB from regression. (TR 411)

The special education teacher managed to follow the directions of various professional who gave input regarding how to reach JB. TRIAD, Ms. Joker and Mr. Darnell all gave various types of methods. The teacher worked very hard to get everything implemented in a timely fashion. (TR 412) She did this because she believed everything that was suggested was in the JB's best interest. (TR 412)

The teacher assistant felt especially bad that the parent would have negative statements for her and the entire staff when she would come and visit. "She would always put us down and what we were doing wrong. Sometimes she would come across rude, in my opinion, treating me in less than a professional way; coming in there and taking paper work and throwing it down and say, 'This is not worth anything'"

A Mediation Agreement was written regarding any issues that were outstanding up through December 2001. This Mediation Agreement terminated any demands for compensatory education. The Agreement specifically states: "This represents the entire agreement between the parties and resolves any disputes, disagreements, or differences currently existing between the parties." (R 90)

II.Issues

1. Whether or not the Extended School Year services stated in the April 12, 2002 IEP report will provide JB with a Free Appropriate Public Education?
2. Whether or not the school district violated JB's rights under IDEA and Section 504 of the Rehabilitation Act of 1973 when the District terminated JB's attendance at the Extended School Program (Day Care)?
3. Whether or not the school district must provide compensatory education for JB.?
4. Whether or not JB is entitled to reimbursement for the Independent Educational Evaluation conducted by Dr. Metzger?

III.Conclusions of Law and Discussion

The Court will first address the issues from a Section 504 standpoint and then review the issues under the Individuals with Disabilities Education Act legal standards. Section 504 of the Rehabilitation Act of 1973 (hereinafter referred to as "Section 504") is a civil rights act, which forbids public school districts from discriminating against students who are disabled due to the student's disability. Further, Section 504 requires students to provide accommodations for students who are qualified under the Act. Section 504 is not as comprehensive as the Individuals with Disabilities Education Act when it comes to establishing specific criteria for school districts to follow when providing services to students under accommodations and modifications. Students are eligible for Section 504 protection if they have a physical or mental impairment that substantially limits one or more major life activities, or if they have a record of or are regarded as having such impairment. [34 CFR 104.3(j)] Section 504's Free Appropriate Public Education standard requires schools to provide services designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met. [34 CFR 104.33(b)(1)(i)] Section 504 also has a Least Restrictive Environment requirement (34 CFR 104.34), which requires students to be served in their regular education classes if possible. Disabled persons are not automatically entitled to participate in every program or activity. Alexander v Choate, 469 U. S. 287 (1985) The obligation of a government program is to make reasonable accommodations to the disabled person. (Alexander) The obligation of a public entity in making its programs available to a person with a disability is to make "reasonable accommodations." A "reasonable accommodation" is one that does

not impose an undue financial or administrative burden or necessitate a substantial alteration in the program. The school district has done what is legally required and has provided funding, staffing, training, and through difficulties in attempting to work with the parent. When a child becomes a danger to himself or others, the school district does not need to make accommodations, which would fundamentally alter their program to accommodate one child.

The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs". 20 USC 1400 (1) (A) (Supp. 1998) A disabled child's right to a free and appropriate public education is assured by the development and implementation of an IEP. (Honig v. Doe, 484 U. S. 305, 311-312) The "centerpiece" of this "free appropriate public education" is the individualized education program ("IEP"), which is a collaboratively developed plan for a disabled child's education. [Reusch v. Fountain, 872 F. Supp. 1421, 1426 (D. Md. 1994)] A disabled child's parents must be included as part of the team that develops and reviews a child's IEP. [20 USC 1414(d)(1)(B)(i)]. "The IEP is supposed to be the joint product of discussions among the child's parents, teachers, and local school officials and must specify goals and short terms objectives for the child, any related services, and the criteria and evaluation procedures that will be used." [Sanger v. Montgomery County Bd. of Educ. 916 F. Supp. 518, 519 (D. Md. 1996)] An IEP must contain both a statement of the child's "present levels of educational performance; and a "statement of the special education and related services and supplementary aids and services to be provided to the

child. " [20 USC 1414(d)(A)(i) and (iii)] IEPs must be revised "not less than annually." [20 USC 1414(d)(4)(A)(i)]

The Individuals with Disabilities Education Act (IDEA) defines free appropriate public education as: special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state education agency, (C) include an appropriate preschool elementary, or secondary school education in the state involved, and (D) are provided inconformity with the individualized education program required under section 1414 (a) (5) of the Act.

In Board of Education v. Rowley, 458 U.S. 176 (1982), it was clearly established that the IEP according to law must be individualized to meet the unique educational needs of the child. The IEP is the primary vehicle through which disabled children are assured a free appropriate public education. In 20 USC 1401 (18) we are specifically informed that the IEP should include the following: (A) a statement of present levels of educational performance of such child, (B) a statement of annual goals, including short term instructional objectives, (C) a statement of the specific educational services to be provided in regular education programs, (D) the projected date for initiation and anticipated duration of such services and (E) appropriate objective criteria and evaluation procedures and schedules for determining on at least annual basis, whether instructional objectives are being achieved.

Rowley also instructs us, "the primary responsibility for formulating the education to be accorded a disabled child, and for choosing the education methods most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation

with the parents or guardian of the child." In these types of cases, the Supreme Court in Rowley (at 192) established that the individualized educational program must be "reasonably calculated" for the child to "receive educational benefits."

The United States Supreme Court in Board of Education v. Rowley, 458 U.S. 176, 192 (1982). established that the individualized educational plan must be "reasonably calculated" for the child to "receive educational benefits".

The United States Supreme Court has held that in order to satisfy its duty to provide a free appropriate public education, a state must provide "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." [Board of Education v Rowley. 458 U. S. 176, 203 (1982)] The holistic impression from the testimony of school board employees, witnesses and the record was that the school district has written an IEP to provide FAPE to JB. Furthermore, the IEP has been implemented in a fashion where JB has made tremendous educational progress.

It is also well settled law that although an appropriate education must confer more than a trivial benefit (Polk v. Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988), it is not required to maximize the child's potential. (Doe v. Board of Education, 9 F. 3d 455 (6th Cir. 1993). From the record, it is obvious that the IEP written for 2001-2002 more than meets the federal and state requirements for a compliant IEP.

As the Court in Rowley observed, it was the intent of Congress in enacting the IDEA that disabled children would be provided a basic floor of opportunity, but beyond this Congress did not impose any particular substantive standard the states has to meet. Rowley at page 200. All that is required by the IDEA is that the education provided by sufficient to confer some educational benefit to the child. Rowley at 200-01. While each

child should receive an education appropriate to his unique needs the IDEA does not necessarily mean that every individual student' potential must be maximized. Rowley at 199. There is no requirement that guarantees a particular outcome for the child. See id. at 192. The Petitioner has failed to present any credible evidence to negate the testimony presented by the school district that the student was not receiving a FAPE.

Since the United State Supreme Court decision of Burlington School Comm. v. Mass. Dept of Educ., 1984-85 EHLR 556:389, courts have consistently held that compensatory education, meaningful additional education and /or related services to make up for time during which a school system failed to provide a FAPE, is an appropriate remedy under IDEA. See, e.g., M.C. v. Central Regional School Dist., 81 F.3d 389 (3rd Cir. 1996); Pihl v. Massachusetts Department of Education, 9 F3d 184 (1st Cir. 1993) Further according to the Office of Special Education Programs, United States Department of Education, IDEA grants due process hearing officers the authority to award compensatory education. [Inquiry of Kohn, 17 EHLR 522 (OSEP 2/13/91)] However, in the instant case, the Mediation agreement stands as to any compensatory time that the student might have been entitled to. The time alleged missed by physical therapist has been made up. The alleged time missed due to early dismissal is without warrant since other days, the student stayed late to finish assignments. Finally, the IEP reflected the time the teacher assistants were being paid not the actual time to be spent with JB. Though there might have been confusion on the part of the school district employees and the parent, JB received the necessary hours in all instances to provide FAPE.

The traditional school year continues for approximately nine months or 180 school days. The term ESY services means special education and related services that are

provided to a child with a disability beyond the normal school year of the school district. This must be done in accordance with the student's IEP and at no cost to the parents. Before the 1997 IDEA amendments officially incorporated the ESY entitlement directly in the federal statute, ESY was a judicially created right. See, e.g. Battle v Pennsylvania, 551 IDELR 647 (3rd Cir. 1980) A school district must involve parents in the determination of whether to provide ESY programming to students with disabilities, and this decision is subject to the IEP process. 34 CFR 300.309

Extended School Year Services (ESY) must be provided if necessary in order for a child to receive a FAPE. 34 CFR 300.309(a) Neither the IDEA nor its implementing regulations state that during a certain time of year, a determination of whether ESY will be needed. While the school district might have thought in September that March 2002 would be an acceptable time, the District's change of time frame is certainly not a violation of any procedural or substantive safeguard found in IDEA.

The attorneys for JB have argued for the entire course of this hearing for the school district to provide more than what is required under the 6th circuit legal standard as stated in Cordrey v Eukert, 917 F.2d 1460 (6th Cir, 1990). The 6th Circuit standard by which ESY programs are measured is whether the program proposed by the school system is sufficient to enable the student to receive FAPE. That is, whether the program (including ESY) is "reasonably calculated to offer some educational benefit to the student." Extended School Year services are not presumed to be necessary, must be shown to be necessary based upon the particular need of the student, are not required just to provide additional benefit to the student, and are only required when a student cannot receive FAPE without them. Cordrey. Testimony throughout the Hearing centered on JB

learning additional concepts or to improve her behavior. Learning additional concepts is beyond the Cordrey standard. Petitioner's proof that JB needed ESY beyond the school districts recommendations for regression/recoupment purposes was insufficient. The amount of time as determined by the IEP Team, that is 9 hours per week during summer school and 3 hours per week after school is finished is appropriate and will keep JB from regressing.

Cordrey acknowledges important considerations for ESY. Firstly, the IDEA is designed to provide some educational benefit in light of the student's given potential. Second, because the IDEA focuses on an appropriate public education, it does not require a school district to go beyond what is necessary to assist in that education. which is otherwise available to non-disabled students. Worthy as the goal of providing unlimited services to disabled children may be. courts must apply the IDEA as it was written. An appropriate education is not synonymous with the best possible education. It is also not an education which enables a child achieve his full potential: even the best public school lack the resources to enable every child to achieve his full potential. Cordrey at 1474.

Thus the Sixth Circuit Court concluded that it is not enough of a justification for ESY programming that a disabled child would attain a greater level of educational progress with 12 month programming than regular 9 month programming. It is not even enough that the child will regress if his or her program is interrupted. A child in regular education lose some skills or learning during the summer: many would learn: more if they had year round programming. The standard is a substantial regression.

Courts across the nation have failed to find that a student is entitled to compensatory education on the rationale that for each minute or hour missed, there must be

compensatory time given. [See e.g.. Parents of Student W., ex re Student W. v. Puyallup School District No 3, 21 IDELR 723 (9th Cir. 1994)] Courts look to see whether a student received a free appropriate public education. (Detroit Public Schools, 29 IDELR 577 (SEA Mich 1998); Conastata Central Sch. Dist., 23 IDELR 145 (SEA NY 1995).

IV.Conclusions

The Extended School Year offered by the school district through the current IEP does meet the standards of the IDEA as interpreted by the 6th Circuit case of Cordrey v. Eukert. Because IDEA does not guarantee the best possible education, ESY programming cannot be ordered for the purpose of maximizing a disable student's educational opportunities. The program and placement proposed by the school system is "reasonably calculated to enable the child to receive educational benefits," Rowley, 458 U.S. 176 at 206-7, and in fact would provide educational benefit to the child. Therefore the program and placement is appropriate, and the school system has provided a free appropriate public education in the least restrictive environment.

Abundance of evidence has been offered that proves that JB is receiving a FAPE in the LRE . This is being done by loving and caring professionals of the school district. JB is extremely lucky to have such an educational opportunity. The Court finds that the Respondent's Legal Counsel is correct when writing in the school district's Post Hearing Brief, it was stated:

> It appears to be Petitioner's position that, since JB is not functioning at grade level, in spite of her many disabilities that the school system is at fault because it

could have "done better." Following this logic, Petitioner seems to suggest that, had the school system performed up to Petitioner's standards that JB's limitation would not exist. Care should be taken, however, not to impose personal expectations of performance, in effect, overruling the law to fit personal notions of appropriate educational standards. (Post Hearing Brief in Behalf of Respondent, page 1-2.)

Outside professionals brought into a hearing to testify as experts are often helpful. In this case the expert testimony of Dr. John Angelopoulos has been exceedingly helpful in making a determination for the Court. But most of all, the teachers and teacher assistants who have worked with JB throughout the years, had the most influence and credibility with this Court. Dr. Metzger's testimony regarding ESY was not persuasive with this Court.

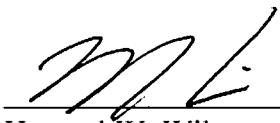
While ESP may be appropriate for JB, it is not the responsibility of the school district to provide this service to JB. An ESP is a great tool for after school day care or childcare, it may be a place where students do learn from their experiences, but it is certainly not a required part of an IEP. Further, under the standards of Section 504, the school certainly is not required to make major alterations to their ESP program to accommodate a child who has demonstrated that she is a danger to herself and others on many occasions. The school district appropriately removed the student from the day care program when the student became a danger to herself and others and began sexual inappropriate behaviors.

The request as stated in the Post Trial Brief of the Petitioner, for reimbursement for Dr. Metzger's observations and testimony due to the expulsion of JB from the ESP is denied. ESP is not a part of JB's IEP, nor was it found to be a necessary part of JB education.

V. Order

1. It is ORDERED that the Extended School Year as stated in the current IEP will provide a Free Appropriate Public Education in the Least Restrictive Environment for JB.
2. It is further ORDERED that JB's rights were not violated under Section 504 when she was removed from Extended School Program (Daycare).
3. It is further ORDERED that the Compensatory Education requested was settled by the December 2001 Mediation Agreement and for reasons listed above.
4. It is further ORDERED that neither the parent nor Dr. Metzger is entitled for reimbursement by the school district for the observation that Dr. Metzger made.
5. It is further ORDERED that the Elizabethton City School System is the prevailing party on all issues before this Court.

Entered this 30th day of June, 2002.



Howard W. Wilson,
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CERTIFICATE OF SERVICE

I hereby certify a true and exact copy of this Final Order was mailed on the 30th day of June, 2002 to Attorneys for the Parent Paul L Erickson, The Law Firm of Paul L. Erickson, P.A., 1998 Henderson Road. Building 1, Suite 3, Asheville, NC 28803 and Jennifer Lichstein, Legal Aid of East Tennessee, Inc, 311 West Walnut St, P. O. Drawer 360, Johnson City. TN 376050: and the Attorney for School District, E. Patrick Hull, P. O. Box 1388, Kingsport, TN 37662; and to the Division of Special Education. State Department of Education, Nashville, TN 37243-0375.

Howard W. Wilson